STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2003
v	No. 232239 Wayne Circuit Court
EUGENE S. CARTER, Defendant-Appellant.	LC No. 00-002348

Before: Meter, P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of three counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to concurrent terms of forty-three to eighty years' imprisonment for each robbery conviction and to a consecutive 2 years' imprisonment for the felony-firearm conviction. We affirm in part, vacate in part, and remand.

Defendant first argues that the trial court erred by admitting witness Valerie Reed's in-court identification of defendant at trial, claiming her identification was tainted by an inappropriate confrontation at the preliminary examination. We disagree.

We review for clear error a trial court's decision to admit identification evidence. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Additionally, even if the trial court erred in admitting identification testimony, reversal is not required if the error was harmless beyond a reasonable doubt. See *People v Solomon*, 220 Mich App 527, 530-531; 560 NW2d 651 (1997).

To establish that an identification procedure denied him due process, a defendant must show that the procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). In assessing the totality of the circumstances, important factors include the time between the criminal act and the confrontation and the length of time that the eyewitness observed the defendant during the offense. *People v Manuel Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In this case, Reed identified defendant at trial less than a year after the robbery and at the preliminary examination only a month after the incident. Additionally, defendant was in the store in question for twenty to thirty minutes the night of the robbery, including fifteen minutes from the time he and his accomplice initially drew their guns. Although defendant's back faced her during part of the encounter, she had ample opportunity to observe him during the robbery. Viewing the circumstances as a whole, the pretrial confrontation was not so suggestive that it led to a substantial likelihood of misidentification. *Williams, supra* at 542.

Moreover, even if an error occurred with regard to Reed's identification of defendant, the error was harmless beyond a reasonable doubt given that two other store employees identified defendant as the perpetrator and given the additional evidence supporting defendant's guilt. Accordingly, reversal is unwarranted. *Solomon, supra* at 530-531.

Next, defendant argues that the trial court erred by denying his request for a corporeal lineup with respect to witness Corletha Miller. We disagree. The decision to grant a defendant's motion for a lineup lies within the trial court's discretion, and we review the decision for an abuse of that discretion. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001).

Although eyewitness identification was a material issue in this case, defendant failed to demonstrate the existence of a reasonable likelihood of mistaken identification that a lineup would tend to resolve. *Id.* Little chance of mistaken identification existed because an adequate, independent basis existed for the eyewitness's in-court identification. *People v Gwinn*, 111 Mich App 223, 250; 314 NW2d 562 (1981). Indeed, Miller testified that she observed defendant enter the store and saw his face for approximately five minutes during the incident. Therefore, we cannot conclude that the trial court abused its discretion in denying defendant's motion for a lineup.

Next, defendant argues the trial court denied him a fair trial when it stated during voir dire that defendant had committed a crime against the people and the state. Defendant moved for a new trial below on this ground, and the trial court denied the motion. We review a trial court's denial of a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

A criminal defendant may be granted a new trial on any ground that would support reversal on appeal or because the verdict resulted in a miscarriage of justice. MCR 6.431(B), *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). To justify a new trial on the ground of judicial misconduct, the defendant must establish that actual prejudice resulted from the misconduct. *Wilkins v Wilkins*, 149 Mich App 779, 787; 386 NW2d 677 (1986).

Viewing the record as a whole, we conclude that the trial court's comments did not deprive defendant of a fair and impartial trial. Viewed in context, the trial court's brief comments, to which defendant did not contemporaneously object, did not rise to the level of a bench determination of defendant's guilt and were not an attempt to improperly shift the burden to defendant or to deny defendant his presumption of innocence. Cf. *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987), and *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). Additionally, the trial court's instructions to the prospective jurors about the

presumption of innocence and its instructions to "keep an open mind throughout the entire course of the case [and] during deliberations" cured any prejudicial effect from the court's comments. We cannot conclude that the trial court abused its discretion by denying the motion for a new trial.

Next, defendant argues that the trial court improperly enhanced his sentence because the prosecutor provided inadequate notice to defendant of his fourth-offense habitual offender status. Specifically, defendant asserts that the prosecutor failed to list the prior convictions on which that status was based. We disagree that resentencing is required. Whether the prosecutor fulfilled the statutory requirements regarding habitual offender enhancements is a question of law, and we review questions of law de novo. See *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

The habitual offender statutes require a prosecutor to provide notice to a defendant within twenty-one days of arraignment of the intent to pursue habitual offender enhancement if the defendant is convicted of the charged offense. MCL 769.13(1). "A notice of intent to seek an enhanced sentence . . . shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." MCL 769.13(2).

Although the failure to timely file notice of a habitual offender charge precludes the prosecutor from pursuing the charge, *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997), the Supreme Court has not required strict adherence to the other statutory requirements in all cases. The Court has concluded that the statutes' purpose "is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." See, generally, *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), superceded in part by statute as stated in *Ellis*, *supra* at 754. Thus, the courts have considered whether the defendant received notice of possible sentence enhancement and whether failure to comply with a particular requirement prejudiced defendant. See, e.g., *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999); *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997).

In this case, defendant received timely notice of the consequences of a conviction on the underlying charges because the information and amended information both noted that the prosecutor intended to seek sentence enhancement for fourth-offense habitual offender status. Additionally, defendant, as the person who incurred the numerous[1] prior convictions, surely was aware of the existence and nature of the convictions.[2] Finally, it appears from the presentence investigation report that defendant had been previously notified, in 1990, of his status as a fourth-offense habitual offender in connection with another offense. Under these circumstances, defendant cannot credibly argue that the prosecutor's failure to list the prior convictions prejudiced him, and resentencing is thus unwarranted.

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[1] It appears from the record that defendant had at least six prior felony convictions.

[2] Moreover, defendant received disclosure of his prior convictions in the presentence investigation report.

Next, defendant argues that prosecution witness Miller perjured herself, denying him a fair trial. Defendant contends that Miller lied when she stated she did not attend defendant's preliminary examination. Because defendant failed to preserve this issue by raising it below, our review is limited to plain error under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Thus, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e., affected the outcome of the proceedings. *Id.*

The record does not support defendant's claim. The preliminary examination transcript indicates the witness did not testify at the proceeding, and defendant has pointed to no evidence that she was there. He merely asserts as such in his appellate brief. Accordingly, defendant has failed to establish that he is entitled to appellate relief.

Next, defendant argues that the trial court improperly denied his for-cause challenge of a juror during voir dire. We disagree. A trial court's ruling regarding a challenge for cause is reviewed for an abuse of discretion. *People v Benny Johnson, Jr.*, 245 Mich App 243, 256 n 5; 631 NW2d 1 (2001). However, defendant did not preserve this issue for appeal because he failed to exhaust his peremptory challenges and did not express dissatisfaction with the jury. *People v Jendrzejewski*, 455 Mich 495, 514 n 19; 566 NW2d 530 (1997). Therefore, our review is limited to plain error. *Carines, supra* at 763.

For a trial court's denial of a challenge for cause to warrant reversal, four requirements must be met:

> There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished to later excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).]

These requirements are not met here. First, the trial court did not improperly deny defendant's challenge for cause because it determined that the juror could fairly decide the case without prejudice toward defendant. Second, defendant failed to exhaust his peremptory challenges.[3] Therefore, the trial court did not commit plain error requiring reversal.

Finally, defendant argues that his convictions on two armed robbery counts involving one victim violated his constitutional protection against double jeopardy. We agree. A double jeopardy claim presents a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Although defendant failed to preserve this issue, a double jeopardy issue involves a "significant constitutional question" that we may review nonetheless. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

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[3] Defendant passed on exercising a peremptory challenge at the end of jury selection, indicating he had not exhausted them.

The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the double jeopardy clause "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000).

The double jeopardy protection is a limitation on courts and prosecutors and not on the Legislature's power to define crimes and fix punishments. *People v Denio*, 454 Mich 691, 709; 564 NW2d 13 (1997). Thus, "[t]he dispositive question is whether the Legislature intended that two convictions might result under MCL 750.529; MSA 28.797 [the armed robbery statute] under the circumstances presented in this case." *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983). "[T]he appropriate 'unit of prosecution' for armed robbery is the person assaulted and robbed." *Id.* at 112.

Defendant was accused and convicted of robbing the store manager of personal property and store property. However, because the manager was only one person, defendant could not properly be charged with two counts of armed robbery with respect to this victim, even though the property taken did not all belong to the victim. *People v Graves*, 207 Mich App 217, 219; 523 NW2d 876 (1994). Therefore, defendant's conviction on two armed robbery counts with respect to the store manager violated his constitutional protection against double jeopardy. Accordingly, we vacate defendant's conviction and sentence on one count of armed robbery involving this victim and remand for entry of a new judgment of sentence.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns